87-1970

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REYNOLDS K. OHAI,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEVADA,
Respondent.

ON PETITION
FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

WILLIAM PAULSON, ESQ.
28271 Rancho De Linda
Laguna Niguel, California 92677
(714) 643-9070
Attorney for Petitioner

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. WAS IT ERROR FOR THE TRIAL COURT TO DENY THE MOTION TO DISMISS THE CHARGES IN THAT NRS 465.080 IS UNCONSTITUTIONAL ON ITS FACT?
2. DID THE DISTRICT COURT AND THE SUCOURT FAIL TO PROPERLY REVIEW THE CONSTITUTIONAL REQUIREMENT FOR A FAIR TRIAL?
3. DID THE NEVADA COURTS ERR BY NOT RULING ON THE CONSTITUTIONAL ISSUES PRESENT IN THE PETITION/MOTION?
4. IS THERE A TIME LIMIT TO CORRECT A VOID JUDGMENT UPON MOTION AND AFFIDAVIT OF DEFENDANT?

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NO. _____

IN THE

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REYNOLDS K. OHAI,

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vs.

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

STATE OF NEVADA

Petitioner, REYNOLDS K. OHAI, petitions this Court for a Writ of Certiorari to review the opinion of the Supreme Court of the State of Nevada, rendered in this action.

OPINIONS BELOW

The Order Dismissing Appeal by the Supreme Court, State of Nevada, is attached hereto in Appendix A. The Order Denying the Petition for Post Conviction Relief by the District Court, Clark County, Nevada, is attached hereto in Appendix B.

JURISDICTION

The opinion of the Supreme Court, State of Nevada, was filed March 30,1988, summarily dismissing the appeal from the District Court, Clark County, Nevada, denial of Petitioner's Application for Post Conviction Relief and Motion to Set Aside Void Judgment, made without an evidentiary hearing, and without ruling on the many issues of constitutional violations as set forth herein. The jurisdiction of this court is invoked pursuant to 28 USCS Section 1257(3).

STATUTORY PROVISIONS INVOLVED

The following are listed pursuant to Supreme Court Rule 21 subd 1.(f), and are set forth in detail in Appendix E:

1. United States Constitution, 4th Amend.
2. United States Constitution, 5th Amend.
3. United States Constitution, 6th Amend.
4. United States Constitution,14th Amend.

The following are set forth in the text of the Statement of the Case or in the Reasons for Granting the Writ:

1. NRS* 177.315
2. NRS 177.365(1)
3. NRS 177.375.2
4. NRS 465.015
5. NRS 465.080

*Denotes Nevada Revised Statutes.

STATEMENT OF THE CASE

Petitioner was arrested on January 3, 1982, by the Las Vegas Gaming Control Board Agents, and charged with cheating at gambling while playing a slot machine in the casino of the Tropicana Hotel, pursuant to N.R.S. 465.080. OHAI was observed by security guards to be pulling the lever in such a manner as to constitute manipulating the machine which would freeze the first roll pin symbol with a character of the type required to win in combination with other characters. This was held to be an intentional act to "alter the selection of criteria" for winning. Security also took video(s) of OHAI of these events from a concealed position above the gaming room, which was without the knowledge or consent of OHAI. During this time, Nevada Gaming Agents, vested with full arrest/police authority,

were summoned and participated in the observations and video recordings.

OHAI was, and is, a resident of California. At no time did security or the Gaming Agents appraoch OHAI that his conduct was illegal under Nevada law. OHAI does not appear a vagrant or professional gambler; he rather appears a typical self-employed business man of some means, with a wife of 30 years and several children, active in the community. Rather than discuss his conduct, he was summarily arrested, handcuffed before his family and friends, and taken to the jail, where he was stripped searched, which produced nothing.

At the arrignment OHAI was represented by Nevada Attorney, MURRAY POSIN (C-1), however, on May 6, 1982, OHAI retained FRANK COOK, who represented himself to specialize in criminal trial work. On May 20, 1982, COOK's motion for discov-

ery and disclosure of exculpatory evidence (C-2)was heard by Judge Mendoza, which motion was intended to produce the specific slot machine played by OHAI, identified by Tropicana records as #8054. The Gaming Agents nor the State took possession of #8054, although there was an internal dispute as to the requirement to do so.[1/]

[1/] (RT, Official Transcript, Trial-June 22, 1982)

WITNESS, JOHN THOMAS MILLER, testifying for the State, by Mr. BOWMAN, D.D.A:

". . .

Q AND YOUR OCCUPATION, SIR.

A I'M SENIOR AGENT WITH THE ENFORCEMENT DIVISION OF THE NEVADA STATE GAMING CONTROL BOARD. . .

Q OKAY. DO YOU EVER SEE---YOU HAD AN OPPORTUNITY TO HEAR YOUR AGENT, MR. DREYER*TESTIFY THAT HE DIDN'T FEEL IT WAS NECESSARY TO SAVE THE MACHINE (#8054) FOR EVIDENCE?

A YES, SIR, I DID.

Q ALL RIGHT. AND IS THAT ALSO YOUR OPINION? DO YOU AGREE THAT IT WASN'T NECESSARY TO KEEP THE MACHINE?

A I HAPPEN TO DISAGREE WITH HIM ON THAT. I--

. . ."

*CHRISTOPHER DREYER, Enforcement Agent.

Prior to the motion for the production of #8054, Tropicana had intentionally disposed of the machine by shipping it to the manufacturer, Balley Mfg. Co, where it was destroyed. At that time, OHAI had an expert witness who was prepared to prove that OHAI could not have manipulated the machine as charged.[2/] Subsequently, on June 2, 1982, COOK motioned the court to dismiss based on argument that NRS 465.080(2)(b) and NRS 465.015 are violative of the due process clause of U.S.Const., 14th Amend., as impermissibly vague and overbroad.

[2/] Barkley Nicholson, established as an expert witness,(RT 108-126, 6-22-82) testified:
By Mr. Cook:

Q NOW, YOU SAW THE (VIDEO)TAPE AND YOU SAW MR. OHAI PLACE HIS LEFT HAND, I BELIEVE, AT TIMES ON THE HANDLE, SIR, AND AS HE DID, HE WOULD, ON OCCASION, REACH OVER WITH HIS RIGHT HAND AND STRIKE HIS LEFT HAND (INDICATING).

A ABOUT THAT POWER. . .JUST ABOUT LIKE THAT.

Q IS THAT CAUSING THE MACHINE TO DO WHAT YOU SAW IN THE (VIDEO) TAPE, IN YOUR OPINION?

(cont'd)

Both of the motions were denied by Judge Mendoza, without findings.[3/]

Ultimately, the trial judge ruled that #8054 was not necessary to prove the State's case on corpus delicti, that OHAI was not prejudiced by the destruction of #8054 (which infers that the intentional failure to impound by the Agents was also not prejudicial), and that the State may introduce the video for the jury to view, along with the State's witnesses testifying as to the procedures of similar machines and the possibility of manipulating thereof.

After the guilty verdict (App D) was returned by the jury, OHAI again retained POSIN to pursue his appeal rights, however,

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2/ (Cont'd)
A NO. . . . "

Because the machine was not present for examination, the D.A. was able to establish on cross for the jury to hear that Nicholson was speculating.

3/ (C- 3)Motion to dismiss on vagueness was (cont'd)

POSIN confined the appeal to the issue of the jury selection.[4] In June, 1983, the decision to affirm the conviction was handed down by the Nevada Supreme Court.[5] Since the issues of constitutional violations were not raised or ruled upon on appeal, POSIN advised OHAI to pursue his

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3/ (Cont'd)
denied without comment in the minutes; the motion to dismiss due to destruction of exculpatory evidence, was commented on in the minutes-" COURT ORDERED, on the issue of constitutionality the Motion to Dismiss is Denied.

4/ Due to confusion as to the trial to commence in the AM or PM, OHAI was not present when the jury was selected, and counsel elected to proceed without him, after attorneys approaching the bench (RT-1), although OHAI had not consented to such procedure.

5/ In Nevada, trial courts are District Courts, with one appellate court, the Supreme Court.

It should be noted that the issues of the constitutional violations on destruction of the machine, and the attack on vagueness of the statutes charging criminal conduct were only ruled upon as a part of the pretrial law and motion procedures. COOK did not renew his motions at trial, nor did POSIN appeal these issues. At no time was there ever a defense contest as to the issue of the video violation at the trial or appeal level.

remedies under NRS 177.315, POST CONVICTION RELIEF. OHAI paid a retainer to POSIN to so file, however, POSIN did not file the papers within one year of final decision on appeal, as set forth in NRS 177.315 subd 3.. In July, 1984, POSIN advised OHAI that the time for filing had passed and that the remedies provided for thereunder were no longer available to him, due to the running of the one year time limit.[6/]

6/ In view of the fact that POSIN, not OHAI, had failed to complete the filing timely, the advice of POSIN was not necessarily correct, since the statute provides for a tardy filing, "good cause appearing". Whether or not ineffective counsel would satisfy the statute "good cause" was not tested by POSIN. It should also be noted that in July, 1983, when OHAI retained POSIN for POST CONVICTION RELIEF, he was still"under sentence" by Nev. authorities being on probation from June, 1982, to June, 1984. Thus, the failure of POSIN to fully understand the statute and to proceed accordingly forthwith in 1983, has continued to undermine OHAI's ability to secure a ruling as to the constitutional problems raised herein and below.

Due to the indignities and public disgrace suffered by a man of such standing in the community as befits OHAI, as well as the emotional and physical pain/trauma he had, and continues to have, to be forever branded a "FELON", OHAI desperately sought the advice of a third attorney to pursue any applicable grounds for reversal of his conviction. In March, 1986, he retained JEFFREY SOBEL, Esq., of Las Vegas, who questioned the fact that the one year limitations period absolutely precluded relief thereunder. Based upon the facts and events of the past, SOBEL concluded there was good cause for delay, and proceeded to file an Application for Writ of Habeas Corpus/Petition for Post Conviction Relief, August 11, 1986. However during the response stage of the proceedings, SOBEL withdrew the application, without prejudice, on the grounds

that State v. Baliotis (1982) Nev. 643 P2d 1223, precluded such relief.7/

Again OHAI was not satisfied that there was absolutely no avenue of challenge to the conviction, which he was convinced was a horrible mistake of judgment by the Nevada Gaming Agents, and compounded by the many uncontested violations of his rights at trial, so he turned to California counsel, WILLIAM PIERE PAULSON, to discuss the matter with SOBEL. It was concluded that constitutional issues are never stale, and the court never looses power to set aside and vacate a void judgment, even sua sponte. On March 4, 1987, SOBEL

7/ In Baliotis, the NEVADA SUPREME COURT ruled that in order for a defendant to avail himself of the provisions of NRS 177.315 relief, he must be "under sentence" at the time of the application, which was construed to require that he be subject to Nevada authority by restraint or probation at the time of his application. OHAI was not then under any actual or constructive restraint or supervision.

again filed an Application for Post Conviction Relief but also included therein in the alternative, MOTION TO SET ASIDE AND VACATE VOID JUDGMENT. OHAI wanted PAULSON to represent him in these proceedings, and concurrently with the above filing, a MOTION TO ADMIT OUT OF STATE COUNSEL was filed, so that PAULSON could participate in the District Court's proceedings. The latter motion was heard March 10, 1987, by Judge Thomson, the original trial judge, and it was denied.[8] On March 24, 1987, the

[8] While it is true that the court has discretion to grant or deny the right to appear in that court, the effect of the denial was to deny OHAI the right to be represented by counsel of his choice. In denying the motion the court said (RT-3/10/87, 2-3):

"THE COURT: I usually routinely grant this [appearance of out of state counsel], but I'm beginning to wonder about this case. Mr. Ohai was convicted after trial by jury. I placed him on probation. He's been honorably discharged from probation and he's still filing appeals and petitions and motions. And now we're going to admit out-

(cont'd)

Post Conviction/Void Judgment Application was heard and denied by Judge Thompson, who stated (RT, 3-24-87, 4):

"THE COURT: Well I tried the case and I remember the facts of it. Judge Mendoza, however, did decide this issue [the destruction of #8054] prior to trial, decided it adversely to Mr. OHAI. I think my decision would have been the same. So, I don't think the underlying issue has merit in any event. But more importantly, I think Baliotis precludes me from hearing it at this point.

I'm going to grant the State's motion

8/ (Cont'd)
of-State counsel. I don't think we really need California counsel to tell us how to do it in Nevada. . .

That scares me. California lawyers don't practice the way I prefer. . .

I don't see any value in having California counsel. I'm going to deny the application."

to dismiss the petition for post conviction relief. The petition is dismissed.[9]"

We can find nothing in the record which specifically denotes that the issues raised by the Request to Set Aside Void Judgment have ever been ruled upon, either by Judge Mendoza or the trial court, nor the Supreme Court. Although not stated by Judge Thompson in the quotation set forth above, the effect of the denial was to deny that the judgment was void without ruling thereon as

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[9] It is unclear from the record that Judge Mendoza ruled upon: 1)the lack of good faith in that the Agents did not impound #8054 as material to the guilt/innocence of OHAI; or 2) whether or not the destruction of #8054 as potentially exculpatory evidence to prove his innocence denied him a fair trial. Certainly, the trial court judge did not so rule nor the Supreme Court. Moreover, at no point do we find any evidentiary fact of ruling on the video taken of OHAI at the time of his arrest while playing #8054. The video was permitted into evidence by the trial judge, and shown to the jury as evidence that OHAI manipulated #8054, although #8054 was not available to prove or disprove that theory.

to that part of the motion, although no reason is given as to why the court could not make an evidentiary finding on that point. Ironically, the Nevada Supreme Court in its ORDER DISMISSING APPEAL[10/] (A, 3-4) appears to take the same position, e.g. dismissing the action without ruling on the fact that the judgment is or is not void for the reasons set forth in the moving papers, nor did it make any evidentiary finding on the issues giving rise to the contention of a void judgment by OHAI in his Appeal of the dismissal of his Post Conviction Relief/Void Judgment.

10/ Although Opening and Reply briefs filed by Ohai, and the State filed it Reply brief, the court summarily dismissed the appeal without hearing. Everything said by the Supreme Court is set forth in Appendix A.

REASONS FOR GRANTING THE WRIT

I

IT WAS ERROR FOR THE TRIAL COURT TO DENY THE MOTION TO DISMISS THE CHARGES IN THAT N.R.S. 465.080 IS UNCONSTITUTIONAL ON ITS FACE

The first issue raised in the trial court was the attack by the defense that the statutory charge in the complaint was violative of the U.S.Const. 14th Amend. due process rights, which includes the void for vagueness/overbroad doctrines.

NRS 465.080 provides:

> "Use of counterfeit or unapproved chips or tokens or unlawful coins or devices; possession of certain devices.
>
> . . .
>
> 2. It is unlawful for any person, in playing or using any gambling game designed to be played with, receive or be operated by chips or tokens approved by the state gaming control board or by lawful coin of the United States of America:
>
> . . .
>
> (b) To use any device or means to violate the provisions of this chapter."

Penal laws have routinely been subjected to the scrutiney of the courts for vagueness. The vice in vagueness in criminal statutes is treachery they conceal what persons are included or what acts are prohibited. United States v. Cardiff (1952) 344 US 174, 73 S Ct 189. OHAI was observed playing a slot machine and pulling the handle with a jerky motion, and hitting the machine with the palm of his hand. Such acts are routinely observed in casinos; if such acts are violative by using a means or device, then the statute is applicable to most, if not all, players at one time or other. If a statute is to avoid the constitutional requirement of definiteness then it must be read as giving fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden. United States v. Harris (1954) 347 US

612, 74 S Ct 808; United States v. National Dairy Products Corp. (1963) 372 US 29, 83 S Ct 594[reasonable understanding that contemplated conduct is proscribed]. It is difficult to imagine OHAI, a man of means with no rap sheet, having the required intent to violate the statute. The Nevada legislature did not intend to remove from the crime of cheating the requirement of fraudulent intent. Sheriff of Washoe County v. Martin, 99 Nev. 336 (1983) The query is can one alter the chances of winning in the manner so alleged? Nicholson[11/] testified that the machine probably had a cracked roll pin, and that OHAI was not the cause of the problem. If a machine is defective, does one violate the statute by playing it, or does one have a duty to report the problem[12/]? If the

11/ Supra, page 7. 12/ It was not alleged that the roll pin stuck every time.

the answer is other than NO, then the casino should have the duty to post the area with notice thereof. OHAI was observed, but he was not informed that what he was doing was illegal. The casinos feed these patrons free drinks to encourage them to stand and play, but fail to extend the courtesy of discussing culpable conduct. Those players who use professional charts or counters to decide the outcome of a given game, are not arrested but are asked to leave. The District Court denied the motion without comment. While it is important for OHAI to clear his own name and reputation, the question of constitutionality herein is vital to the public at large. Jerking the handle and hitting slot machines is a way of life for players. If the statute stands unchallenged to this court

it poses a problem to many of our less affluent citizens where economics preclude such attack. This challenge is made not for the benefit of OHAI alone, but for those unnamed defendants still "under sentence" under a law that should not pass muster of objective legal observation away from the home-cooking of local courts.

II

THE DISTRICT COURT AND THE SUPREME COURT HAVE FAILED TO PROPERLY REVIEW THE CONSTITUTIONAL REQUIREMENT FOR A FAIR TRIAL

For whatever reason[13/] the issue of the possible exculpatory nature of #8054 as vital evidence has not been ruled upon, nor have evidentiary facts been determined. In State v. Havas 95 Nev. 706 (1979) undergarments of the allegedvictim were either lost or des-

13/ See discussion below of defendant's right to effective counsel.

troyed, or simply not taken into custody during the investigation of the case. The [Nevada Supreme Court] held that the failure to preserve those undergarments violated due process rights of the accused, and compelled dismissal. This opinion was given in the face of testimony by the victim that her clothing had not been torn during the alleged rape. The court indicated that "the presence or absence of other evidence which would support or refute the testimony of the involved parties has the underlying potential for great significance." [Emphasis ours] Havas must be construed ununder Nevada law to stand for the proposition that the failure to take possession of evidence material to the guilt or innocence of the defendant, deny the defendant a fair trial. Ohai was charged with manipulating #8054, not for

the manipulation of slot machines in general. After he was arrested for very specific charges, between January and June of 1982, no effort was made by any authority to impound the machine, or at the very least to advise the Tropicana security personnel to safeguard the machine. By the time OHAI made his motion to produce #8054, May 30, 1982, the machine, as well as the maintainance history, was also destroyed or not found to be available upon subpena. One's imagination runs wild with thoughts that such destruction was not based on innocent conduct, but that the machine was, in fact, tested by the authorities and found to be incapable of such manipulation. Could anyone of those involved in the arrest not thought the machine to be material evidence? If OHAI was arrested in good faith belief that he was, in

fact, manipulating #8054, then good faith, also, should require the arresting agents to preserve the evidence upon which the charge is based. There is no evidence that any authority made any attempt or effort to maintain the evidence. In United States v. Herndon (1976, CA 5 Fla) 536 F2d 1027, the court held that as a matter of fundamental fairness which due process guarantees, defendant is entitled to access of material relevant evidence which is necessary in the preparation of his defense; whether a defendant has been deprived of this right of due process will depend upon the materiality of the evidence, likelihood of mistaken interpretation of it by government witnesses or the jury, and reasons for its nonavailability. At trial, the duty of a state prosecutor to bring to the attention of the court or

proper officials all significant evidence suggestive of innocence or mitigation is enforced by the requirements of due process. Harlow v. Fitzgerald, 457 US 800, 102 S Ct 2727 Materiality is a condition precedent to claiming denial of due process, but defendant is not required to show materiality of evidence if such showing is prevented by the destruction of the evidence. Turpin v. State (1980) 272 Ind 629. Fundamental fairness and due process were violated when a criminal defendant was denied an opportunity to have his own expert examine and test murder weapon and bullet. Barnard v. Henderson (1975, CA5 La) 514 F2d 744 The destruction of a vehicle which prevents defendant charged with vehiclar homocide from presenting testimony that accident was caused by a defective condition of automobile

and not by fault of the driver denies defendant due process of law where the vehicle is destroyed. People v. Sheppard (1985, Colo) 701 P2d 49.

It is probable that a higher burden of proving that the destroyed evidence would be exculpatory where there has been a good faith effort on the part of the State to preserve it, which certainly is not the instance before us in this case, is present. However, the burden of OHAI, other than to merely show some reason, e.g. the testimony of Nicholson, to believe that the evidence (#8054) would be, in fact, exculpatory if it had not been destroyed is not a difficult burden under Havas, supra, and its progeny. In Deere v. State (1984) 100 Nev. 565, 566, the [Nevada] court construed Havas as compelling dismissal because the clothes

were "considered material and potentially exculpatory on the issue of the use of force". (Emphasis ours] The burden is fairly slight on the defendant, said the Deere court, even where the State in a good faith loss or destruction of evidence is the factual predicate for a Motion to Dismiss; while the defendant must show prejudice, that showing need only consist of "some showing that it could be reasonably anticipated that the evidence sought would be exculpatory". (Deere, supra) The trial testimony of Barkley Nicholson (RT, 108-126) clearly supports OHAI's position that #8054 was critical to his right to a fair trial and was material to his defense.

III

FAILURE OF THE NEVADA COURTS TO RULE ON THE CONSTITUTIONAL ISSUES PRESENT IN THE POST CONVICTION RELIEF/VOID JUDGMENT IS ERROR

The record is absolutely clear; the failure to have the denial of the two motions heard as a part of the pre-trial law and motion procedure timely reviewed on appeal of the judgment of conviction, or by Post Conviction Relief was due to ineffective counsel, not by waiver or neglect. OHAI wanted to appeal his conviction, and retained counsel to file such appeal, but counsel filed the appeal without raising the issues of the two vital areas of trial court error: 1) whether or not the charging statute was constitional; and 2) the destruction of possible exculpatory evidence as the denial of a fair trial. Moreover, the record does not indicate that the trial counsel for OHAI reasserted the two critical motions to the trial judge by way of a motion in limine, or otherwise, since

the denial of the motions by Judge Mendoza in law and motion is not binding upon the trial judge.[14/] Not only was there no ruling as to these issues by the trial court, the Supreme Court order dismissing appeal (App A) skirted the issues in favor of ruling along the lines of lapse of timely filing and/or waiver. The Supreme Court said in its ORDER DISMISSING APPEAL (App A):

> "Appellant did not file the instant petition until nearly four years after the final decision on his direct appeal. Appellant has not demonstrated "good cause" for his failure to bring the petition within one year.
>
> Further, pursuant to NRS 177.375(2),
>
> 'If the petitioner's conviction was the result of a trial, all claims for post-conviction relief are waived which were or could have been:
>
> (a) presented to the trial court
> (b) raised in direct appeal. . . . . .unless the court finds good cause for the failure to present the claims . . .

14/ Judge Thompson, (Cont'd)

> In a motion made before trial, appellant raised the same issues that he raised in the instant petition. However, after the district court ruled against him, appellant did not raise the issue in his direct appeal from the judgment of conviction. Appellant has not demonstrated good cause for his failure to raise this issue on direct appeal. We therefore conclude that appellant has waived this claim under NRS 177.375(2)."

This ruling appears to be contrary to the holding in Ake v. Oklahoma (1985, US) 105 S Ct 1087, where the holding was that the United States Supreme Court has jurisdiction to review state criminal conviction raising issue of defendant's constitutional right, despite state court ruling that claim has been waived by virtue of failure to repeat request for psychiartrist in a motion for new trial, since the state waiver rule does not apply to fundamental trial error and constitutional

14/ (Cont'd) who presided at trial and who heard the first level of argument of the Post Conviction Relief/Void Judgment, said in the proceedings that he did not rule upon that (exculpatory evidence) See P14 supra

errors are fundamental issues; [Emphasis ours] thus, application of procedural bar depends on antecedent ruling on federal law and state court's judgment consequently does not rest on independent state ground. We believe that the Ake ruling means that convictions under statutes which are alleged to be impermissively vague/overbroad, and/or the subsequent denial of a fair trial by the intentional destruction of possible exculpatory evidence are such violations as to require that those issues be specifically decided upon. There has been no such ruling in this case.

Moreover, OHAI is a layman who has exercised his right to counsel, has admonished each one to pursue his appeal or other post conviction rights, yet he has been seriously ineffectively so represented, in that everything that has

been done for him in the past has been botched. Contrary to the ruling by the Nevada Supreme Court that "Appellant has not demonstrated good cause" for his failure to timely bring these issues to the court, OHAI has spent much time and money on attorneys to do that very thing, attorneys who he had every right to expect were competently effective, and who represented themselves thusly. In Stewart v. Warden, Nev. State Prison 92 Nev. 555 (1976) the court held that an unexplained failure of petitioner's former counsel to raise certain claims of error in his direct appeal, as requested by petitioner while his appeal was in progress, constituted a "reasonable explanation" and "good cause" for petitioner's failure to present such issues in his direct appeal and the district judge in post conviction pro-

proceedings should have resolved those claims [Emphasis ours]. The mandatory "should" suggests that the district judge must hold evidentiary hearing to determine the facts upon which the issue is contested. In Bolden v State 99 Nev. 181 (1983), the court held that a claim that trial counsel provided constitutionally ineffective assistance, based upon a petition with factual allegations and accompanying affidavit, could not have been raised and determined on appeal due to the necessity of an evidentiary hearing to resolve questions of fact; there is no waiver of such a claim by failing to raise it on direct appeal.[15/] The order of dismissal

---

15/ In Bolden, the court said:
". . .[I]f a petition for post-conviction relief contains allegations of facts outside the record which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required. . . (Cont'd)

in the instant case by the Nevada Supreme Court appears to be in conflict with its ruling in both Stewart and Bolden. The petition filed on behalf of OHAI raises all of the constitutional issues herein raised but which were unanswered by the Nevada courts; additionally, submitted with the petition was the accompanying affidavit of OHAI, to wit: . . Under the circumstances, the conviction is compounded by the continuous incompetence of trial counsel and the original post-conviction counsel's erroneous advice in that the points and authorities herein raised have never been heard on direct

15/ (Cont'd)
Since the petition raises a constitutional question of fact, the district court shall order that appellant be present at that hearing in accordance with the mandate of NRS 177.365(1)."
NOTE: NRS 177.315(1) states:"...If the petition presents a constitutional question of fact, the court shall order the petitioner brought before it for the hearing."

application to this court. . .". Thus, at the very least, the Bolden rule has been satisfied by OHAI, yet there has been no compliance therewith by the courts. Harmless error tests are not applicable where defendant has been denied procedural rights so fundamental as effective assistance of counsel. United States v. Goodwin (1976, CA 6 Tenn) 531 F2d 347 The sixth amendment guarantee that the accused in a criminal proceeding shall enjoy right to have assistance of counsel means effective assistance, as distinguished from bad faith, sham, mere pretense of want of opportunity for conference and preparation. United States v. Davis (1971, CA 10 Okla) 436 F2d 679 Ineffective counsel as violation of defendant's 6th Amend. rights have been found: 1) Failure of attorney to file brief on

direct appeal, Cannon v. Berry (1984, CA 11 Ala) 727 F2d 1020; 2) Failure by attorney to perfect appeal where client has indicated desire to appeal, Clay v. Director Juvenile Div., Dept. of Corrections (1984, CA7 Ill) 749 F2d 427; and 3) counsel was ineffective in asisting suspect by failing to raise on appeal nonfrivolous issues of ineffective counsel at trial and unlawful search of wallet taken from defendant's personal property and introduced into evidence, both of which are nonfrivolous issues, and affidavit of counsel that appeal was without merit constituted below minimum standards of competency required of counsel in criminal cases. Lockhart v. McCotter (1986, CA5 Tex) 782 F2d 1275. Upon any reading of the case law standards of competency for effective, or ineffective,

counsel, OHAI's rights have been violated all along in his quest for a review of his complaints of lack of due process, statutory vagueness, and ineffective counsel issues to be ruled upon.

IV

IT IS ERROR FOR THE NEVADA SUPREME COURT TO DISMISS THE PETITION FOR POST CONVICTION RELIEF AND MOTION TO SET ASIDE VOID JUDGMENT ON THE BASIS THAT IT IS NOT TIMELY FILED

The contention in OHAI's Motion to Set Aside Void Judgment is that the application of state time limits upon which the motion was denied are inapplicable to motions raising issues of constitutional violations. If this contention be true, the Order Dismissing Appeal (App A) is clearly erroneous. In Allen v. United States (1952 DC ND Ill) 102 FSup 866, the defendant was convicted and sentenced to prison in

in 1933 and then conditionally released in 1942. After being in and out of prison for various reasons, while in custody in 1950 a warrant was served on him for violation of probation on the 1933 charge, for which he was again incarcerated. At this time, being some 19 years later, defendant petitioned the Federal court to set aside the original conviction on the basis of denial of right to assistance of counsel under the 6th Amendment. The court order a [evidentiary] hearing and required the production of defendant therefor. It was discovered that the court record was completely silent as to whether or not the defendant had waived his right to counsel. The court held that compliance with the 6th Amendment constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an

accused of his life and liberty.(citing Palko v. Connecticut 287 US 45, 58 S Ct 149; Powell v. Alabama 287 US 45, 53 S Ct 55, and Johnson v. Zerbst 304 US 458, 58 S Ct 1019). After 19 years from the date of original sentence, the Allen court set forth what is considered directly on point with the procedural defects with the Nevada ruling(s) on due diligence, to wit:

> "...As to the government's remaining contention, i.e. that Allen did not assert his constitutional right with due diligence and, therefore, is not entitled to relief, the court is unable to perceive its applicability. A void judgment is as void today as it was twenty years ago [Emphasis ours] No aging process, whereby a void judgment improves as to stature and validity by the passage of time, can properly be imposed. . ."

It is the contention of OHAI that where constitutional issues are material to a conviction based upon the premise that the judgment is void, then time stands

still. In Warden, Nevada State Prison v. Peters, 83 Nev. 298, the court said:

> "...We deem the procedural label to be of little importance. The fact remains that courts which make a mistake in rendering a judgment which works to the extreme detriment of the defendant will not allow it to stand uncorrected. In a situation such as this, were, as discussed below, the court has inherent power to reconsider a judgment for good cause shown, we hold that such an issue may be raised by a motion to vacate judgment, though technically in this state (Nevada) the matter probably should have been raised by habeas corpus. . .
>
> The trial court has inherent jurisdiction to vacate or modify its orders and judgments.(citing cases) Justice requires that when a court errs in its adjudication of a defendant, a vacation of the adjudication results in a vacation of the sentence so that the defendant can be returned to his prior status. If a guilty plea is the product of ignorance, fear, inadvertence or coercion, it must be vacated as void since it is violative of constitutional safeguards, and the passage of time does not close the door to its reconsideration." [Emphasis ours]

It again appears that not only is the Nevada Supreme Court in dismissing the

petition filed herein by OHAI, in conflict with its own ruling in the Stewart and Bolden cases (supra, page 34), it is also in conflict with its ruling in Peters.

V

WITHOUT PRIOR CONSENT OF DEFENDANT OR SEARCH WARRANT SHOWING PROBABLE CAUSE, VIDEO OBSERVATION DEVICES ARE INTRUSIVE OF 4TH AMEND. SEARCH AND SEIZURE RIGHTS

At the trial of OHAI, the prosecution was permitted to introduce into evidence and show a video taken by the Tropicana Security personnel from a concealed position above the casino level. This video showed OHAI gambling at the slot machine, hitting the machine and pulling the handle in a jerking motion, which is the basis upon which the State sought to prove the criminal conduct and intent. The security personnel and the Gaming Agents observed this same senario, thus, the State

was not without witnesses to come before the jury and testify as to what they saw. In order to be protected by the 4th Amendment right, the defendant must show an expectation of privacy and justifible reliance thereon. United States v. Barnes (1980, CA8 Mo) 634 F2d 387 And it would seem that the use of video surveillance is not unreasonable pursuant to a warrant where the State has a high degree of interest in gathering information as to criminal conduct and is unable to achieve this goal with less intrusive means. People v. Teicher (1981) 52 NY2d 638.

The State has argued that OHAI had no reasonable expectation or right to privacy while gambling in a casino where there are persons, public and employees, present to see and hear most

everything going on at any one time. That may be true to an extent, but does that extend to an unknown video recording? Does one who enters such premises expect that his presence is being video taped for posterity? There are no signs posted to put the public on notice that by entering the premises one consents to video monitoring of one's activities, and no written waivers are presented at the door upon entry. While one may wish to take the chance that he will not be recognized by anyone present around him, or that his activities are watched by others in the immediate vicinity, his presence alone would not seem to satisfy the requirements of using less intrusive means to gather evidence as in this case. The taking of the video, showing it to the jury, destroying #8054, would appear to be one of those instances where in a

given instance such conduct may be justified, e.g. in a stakeout, but in the context of OHAI's case it would seem to best be labeled - - outrageous! The Allen, supra, court clearly set forth the premise that where constitutional violations are present to be reviewed:

> "It should be patent from the foregoing [protection of 6th Amend. rights] that it is not the function of this court to concern itself, in a proceeding of this nature [set aside a void judgment], with the guilt or innocence or the petitioner." (at 869)

Although we raised the issues of unreasonable searches and seizures in the taking of the video in our petition to set aside a void judgment, the court did not rule thereon, nor was there an evidentiary hearing. This violation, as are the others as set forth herein, remains to be deter-

mined as to its legal consequences.

CONCLUSION

Based upon the above, it appears that Mr. OHAI requires the assistance of this court in order to have his case legally evaluated. For some reason the Nevada courts have refused to rule one way or the other on vital questions of fact as to the constitutional issues raised in his petition. There is adequate precedent for the specific relief which he seeks, yet the courts are silent on those issues. It is respectfully suggested that the framers had all the Mr. OHAIS in our land in mind when they set forth the rights, and gave to this court the responsibility to protect the same.

We pray that the court will grant this petition for certiorari, and thereby, "return him to his prior status",

a position of pride in the accomplishments in his life, without the problem of forever living with questions not ruled upon, and without further source once his instant petition to this court is reviewed.

Although not argued in the Nevada petition or above, it now appears that the question of OHAI being under sentence is raised by an ambiguity in the Court Judgment, Appendix D 2:

". . .Conditions: . . .

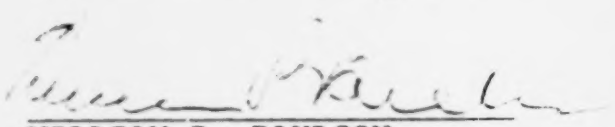
(3) Defendant is precluded from entering any place where gambling is going on or from gambling."

It would appear that, although OHAI has been honorably discharged from probation, that the above could logically be construed as still present should OHAI again be found to be "gambling". It is at the very least, ambiguous, and has been over-

looked, or disregarded, as a basis to bring OHAI within the statutes for Post-Conviction Relief.

DATED: May 23, 1988.

Respectfully submitted,



WILLIAM P. PAULSON
Attorney for Petitioner,
REYNOLDS K. OHAI

APPENDIX "A"

IN THE SUPREME COURT

OF THE STATE OF NEVADA

FILED

MAR 30 1988

/s/J.Richards
JUDITH FOUNTAIN
CLERK, SUPREME
COURT

REYNOLDS K. OHAI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 18182

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief. Appellant was convicted of cheating at gambling on August 10, 1982. The district court sentenced appellant to serve one year in prison and to pay a $5,000.00 fine. The court suspended appellant's prison sentence and placed him on probation for two years.

Appellant appealed his judgment of conviction to this court. On June 24,

1983, this court affirmed the judgment and dismissed appellant's direct appeal in docket No. 14342.

Appellant filed the instant petition, entitled "Application for Writ of Habeas Corpus by Petition for Post Conviction Relief and Motion to Set Aside Void Judgment", on March 4, 1987, nearly four years after the final decision on his direct appeal. The district court denied appellant's petition because, at the time he filed his petition, appellant was not "under sentence" as required by NRS 177.315(1).

Pursuant to NRS 177.315(1), a petition for post-conviction relief may be filed by "[a]ny person convicted of a crime and under sentence of death or imprisonment in the state prison who claims that the conviction was obtained, or that the sentence was imposed, in

violation of the Constitution of the United States or the constitution of this state. . ." In State v Baliotis, 98 Nev. 176, 643 P.2d 1223 (1982), this court determined that post-conviction relief was not available to appellant Baliotis because, at the time he petitioned for post-conviction relief, he had already completed his probation and was not subject to any actual or constructive restraint or supervision. We stated:

> "We have interpreted the term "under sentence" as requiring, at minimum, some form of constructive restraint or supervision. [T]he provision "under sentence' means that the petitioner must at the time he files his writ for habeas relief [pursuant to NRS 177.315] be subject to Nevada authority, whether as one physically confined or under supervision as a probationer or parolee or otherwise restrained of liberty."

98 Nev. at 178, 643 P.2d at 1224 (quoting Dixon v. Warden, 85 Nev. 703, 704-705, 462 P.2d 753, 754 (1969).

In the present case, appellant admits that at the time he filed his petition, he "had completed his probationary period and had paid his fine, thus he was not under any actual or constructive restraint or supervision." Appellant was not physically confined, under supervision or otherwise restrained of his liberty. We conclude, therefore, that the district court properly determined that post-conviction relief was not available to appellant. In addition, NRS 177.315 provides,

> Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, must be filed within one year after entry of judgment of conviction or, if an appeal has been taken from such judgment, within one year after entry of judgment of conviction or, if an appeal has been taken from such judgment, within one year after the final decision upon or pursuant to the appeal.

Appellant did not file the instant petition until nearly four years after the

final decision on his direct appeal. Appellant has not demonstrated "good cause" for his failure to bring the petition within one year.

Further, pursuant to NRS 177.375(2).

> If the petitioner's conviction was the result of a trial, all claims for post-conviction relief are waived which were or could have been:
> (a) presented to the trial court
> (b) raised in a direct appeal. . .
> . . .unless the court finds good cause for the failure to present the claims...

In a motion made before trial, appellant raised the same issue that he raised in the instant petition. However, after the district court ruled against him, appellant did not raise the issue in his direct appeal from the judgment of conviction. Appellant has not demonstrated good cause for his failure to raise this issue on direct appeal. We therefore conclude that appellant has waived this claim under NRS 177.375(2).

Appellant's post-conviction petition was alternatively denominated a "motion to set aside void judgment," brought pursuant to NRCP 60(b). Appellant contends that NRS 177.315(2) allows him to seek such alternative relief. This contention is incorrect. NRS 177.315(2) provides:

> The remedy provided in this section is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, the remedy of direct review of the sentence or conviction or the writ of habeas corpus. It comprehends and takes the place of all other common law, statutory or other remedies which have heretofore been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.

The statute clearly excludes alternative means of seeking post-conviction relief from a judgment of conviction.

Appellant's remaining contentions lacking merit, we hereby

ORDER this appeal dismissed.

/s/_____,C.J.
Gunderson

/s/_____,J.
Steffen

/s/_____,J.
Young

/s/_____,J.
Springer

/s/_____,J.
Mowbray

CC: Hon James A. Brennan, District Judge
Hon Brian McKay, Attorney General
Hon. Rex Bell, District Attorney
Jeffrey D. Sobel
William Piere Paulson
Loretta Bowman, Clerk

APPENDIX "B"

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, ---vs--- REYNOLDS K. OHAI aka Chai, Defendant.	FILED May 19 3 31PM'87 /s/Loretta Bowman CLERK CASE NO. C57322 DEPT NO. I

O R D E R

DATE OF HEARING: 3-24-87

TIME OF HEARING: 9:00 AM

This matter having come on for hearing before the above entitled Court on the 24th day of March, 1987, the Defendant not being present with his counsel, JEFFREY D. SOBEL, Esq. the Plaintiff being represented by REX BELL, District Attorney, by and through MICHAEL P. Villani, Deputy District Attorney, and the Court having heard the

arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that the Defendant's Petition for Post-Conviction relief shall be, and it is, hereby denied.

DATED this 15th day of May, 1987.

/s/ Brennen
District Judge

for J. Charles Thompson

/s/
MICHAEL P. VILLANI
Deputy District Attorney

APPENDIX "C"

Case No. C 57322 Title The State of Nevada vs. Reynolds K. Ohai

Date, Judge Officers of Court Present	Appearances-Hearing
3-30-83	INITIAL ARRAIGNMENT
JOHN F. MENDOZA	State represented by
DEPT. FIVE	Christopher Owens and
R. Snape	Nancy Oesterle,D.D.A's
Clerk	Def. present with
R. Silvaggio,	Murray Posin.
Reporter	Def. was arraigned and
Cont'd to	stated his true name
5-17-82	was REYNOLDS K. CHAI
10:00 AM	and Court Ordered
JT	records be amended to
5-13-82	show. Def. entered a
9:00 AM	plea of NOT GUILTY.
Cal Call	Mr. Posin moved to
	waive the presence of
	the Def. for calendar
	call and COURT SO
	ORDERED.

Mr. Posin moved to have a copy of the video tape provided to them. COURT ORDERED, the video tape is to be released to the District Attorney's office and a copy of the tape is to be made for the defendant. FURTHER ORDERED, this matter set for Trial May 17, 1982 at 10:00 AM and Calendar Call will be May 13, 1982 at 9:00 AM.

Bail

5-6-82
JOHN F. MENDOZA
DEPT. FIVE

Defendant's Motion to Continue Jury Trial
State Represented by

Christopher Owens, D.D.A. Def. OHAI not present Represented by FRANK COOK No object to Motion To Continue by Mr. Owens COURT ORDERED, Trial Date of May 17, 1982 and Calendar Call of May 13, 1982 are vacated and this matter is set for Trial June 21, 1982 at 10:00AM and Calendar Call will be June 17, 1982.

5-30-82
JOHN F. MENDOZA
DEPT. FIVE

DEFENDANT'S MOTION FOR DISCOVERY AND DISCLOSURE OF EXCULPATORY EVIDENCE, INSPECTION OF SLOT MACHINE RECORDS OR IN THE ALTERNATIVE ORDER

TO ALLOW THE TAKING OF DEPOSITIONS State represented by Michael Amador, DDA Def. OHAI not present represented by FRANK COOK Court heard arguments of counsel Court stated its findings COURT ORDERED, Motion is granted.

6-1-82
JOHN F. MENDOZA
DEPT. V

DEFENDANT'S MOTION TO DISMISS [1]

State represented by William Koot, DDA Def. not present, represented by FRANK COOK COURT ORDERED, Motion to Dismiss is denied.

1/ Motion to Dismiss on basis that the Statute charging OHAI is vague and overbroad. 14th Amend. U. S. Const.

6-10-82	DEFENDANT'S MOTION TO
JOHN F. MENDOZA	DISMISS [2/]
DEPT. V	State represented by Chris Owens Def. not present and represented by FRANK COOK Mr. Cook stated he has spoken with Mr. Owens of the DA's office who represented he needed more time to respond to Motion to Dismiss. COURT ORDERED, matter cont'd... Cont'd. to 6-15-82 9:00 AM
6-15-82	DEFENDANT'S MOTION TO
JOHN F. MENDOZA	DISMISS
DEPT V	State represented by Chris Owens, DDA

2/ Motion to Dismiss on basis of destruction of possible exculpatory evidence. 5th Amend. U. S. Const.

Def. not present and represented by FRANK COOK. Mr. Cook presented motion and argued in support thereof Statement by Mr. Owens. COURT ORDERED, on the issue of Constitutionality the Motion to Dismiss is Denied

APPENDIX "D"

CASE NO. C 57322

DEPT. NO. I

FILED AUG 10 10 54AM '82

/s/ Not ledgible

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,

Plaintiff,

-vs-

REYNOLDS K. CHAI aka Ohai,

Defendant.

JUDGEMENT OF CONVICTION
JURY TRIAL

WHEREAS, on the 10th day of March, 1982, the Defendant REYNOLDS K. CHAI aka Ohai, enter a plea of not guilty to the crime of CHEATING AT GAMBLING, committed on the 3d day of January, 1982, in violation of NRS 465.080, and the matter having been tried before a jury, and the defendant being represented by counsel and having been found guilty of the crime

of CHEATING AT GAMBLING; and

WHEREAS, thereafter, on the 3rd day of August, 1982, the defendant being present in Court with his counsel MURRAY POSIN, and C. Dan Bowman, Deputy District Attorney, also being present, the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant to serve a term of one (1) year in the Nevada State Prison and pay a fine of $5,000.00, prison time suspended and placed on probation for an indeterminate period not to exceed two (2) years. Conditions: (1) The fine of$5,000.00 to be paid at such time or in such installments as Parole & Probation shall reasonably require; (2) Search clause; (3) Defendant is precluded from entering any place where gambling is going on or from gambling.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 9 day of August, 1982, in the City of Las Vegas, County of Clark, State of Nevada.

/s/_____
J. Charles Thompson
DISTRICT JUDGE

DA#82-57322X/bl

NSGCB DR# 82-2010

APPENDIX "E"

U.S.CONSTITUTION, AMENDMENT 4

UNREASONABLE searches and seizures. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the psersons or things to be seized.

U.S.CONSTITUTION, AMENDMENT 5

CRIMINAL ACTIONS-PROVISIONS CONCERNING-DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.

No person shall be held to answer for a capital crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.CONSTITUTION, AMENDMENT 6

RIGHTS OF THE ACCUSED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance

of Counsel for his defense.

U.S.CONSTITUTION, AMENDMENT 14

SECTION 1. CITIZENS OF THE UNITED STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.